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No. 84-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHWEST AIRLINES, INC.

Petitioner,

v.

MARY P. LAFFEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Pursuant to Rule 22.6 of the Rules of this Court, petitioner, Northwest Airlines, Inc., submits this supplemental brief in support of its petition for a writ of certiorari in order to discuss this Court's decision in *Trans World Airlines, Inc.* v. *Thurston,* No. 83-997, decided on January 8, 1985. *Thurston* is highly material to two of the four issues presented by Northwest's petition and mandates in favor of granting the petition. Those two issues are: (1) the proper test for determining whether a violation of the Fair Labor Standards Act ("FLSA") is "willful" and thus gives

rise to an exceptional third year of backpay liability, *see* 29 U.S.C. § 255(a); and (2) whether an employer acted in "good faith" and with "reasonable grounds" for believing his conduct did not violate the FLSA and, thus, may be relieved of liquidated damages pursuant to 29 U.S.C. § 260.

I. PROPER TEST FOR "WILLFUL VIOLATION"

In *Thurston,* this Court held that a finding of "willful violation" within the meaning of Section 7(b) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(b)—which governs the award of double damages under that Act—requires a showing that an employer "'knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" Slip op. at 13-14, *quoting* 713 F.2d at 956. The Court expressly left open the question whether the same standard of "willful violation" necessarily governs Section 6 of the Portal to Portal Act of 1947 ("PPA"), 29 U.S.C. § 255(a), "which is incorporated in both the ADEA [29 U.S.C. § 626(e)] and the FLSA [29 U.S.C. § 255(a)]." Slip op. at 14. Section 6 of the PPA provides a two-year backpay recovery period for most violations, but a three-year period for "willful violations." The question of the meaning of "willful violation" in Section 6 of the PPA is squarely presented by Northwest's petition in *Laffey.*

1. This Court's opinion in *Thurston* confirms the existence of a conflict among the circuits. The Court recognized that the "Courts of Appeals are divided over whether Congress intended the 'willfulness' standard to be identical for determining liquidated

damages and for purposes of the limitations period." Slip op. at 15 n.21. In requiring the application of the "knowing or reckless standard" for determining liquidated damages under Section 7(b) of the ADEA, this Court rejected the "in the picture" standard followed by some courts under Section 6 of the PPA. The standard followed by the court below in *Laffey* is similar to the "in the picture" standard.

If, as Northwest contends (Pet. at 20-21), the conflict should be resolved in favor of an identical standard under the two provisions, the standard applied below in *Laffey* is unquestionably wrong.[1] This Court should grant Northwest's petition to resolve the conflict over whether the identical term in both statutory provisions should have the same meaning. as well as the conflict among the circuits regarding the meaning of "willful violation" under Section 6 of the PPA (*see* Pet. at 19-20).

2. The reasoning of *Thurston* demonstrates that the standard adopted by the court below is erroneous. The most important factor that this Court considered in rejecting the "in the picture" standard was its conclusion that the standard as a practical matter would lead to the imposition of the highest amount of possible damages in almost every case, thereby destroying the two-tiered statutory liability scheme. The Court stated:

> "More importantly, the broad standard proposed by the respondents would result in an award of

[1] As the Court also recognized in *Thurston*, the standard applied below would be inconsistent "with the manner in which this Court has interpreted the term [willful] in other criminal and civil statutes." Slip op. at 14.

> double damages in almost every case. As employers are required to post ADEA notices, it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability. Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme. We decline to interpret the liquidated damages provision of ADEA § 7(b) in a manner that frustrates this intent." Slip op. at 15 (footnote omitted).

Section 6 of the PPA also establishes a "two-tiered liability scheme." Under Section 6, the backpay recovery period is limited to two years, *"except"* in a case "arising out of a willful violation." 29 U.S.C. § 255(a) (emphasis added). Only in the exceptional case may the added liability be imposed. Nonetheless, as indicated by a recent survey, the effect of decisions like those of the court below and the Fifth Circuit in *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972), articulating the "in the picture" standard, is to frustrate Congress' intent by making it "virtually impossible" for an employer to show that his violation was not willful. That standard has rendered the two-year backpay period a rare exception, if not a statutory relic. *See* Note, *Standards of Willfulness Under The Fair Labor Standards Act*, 78 Mich. L. Rev. 626, 632 (1980) (courts adopting a broad standard have found violations "willful" in all but one case).

II. STANDARDS FOR "LIQUIDATED DAMAGES"

In *Thurston,* the Court expressly applied the standard of "good faith" and "reasonable grounds" that governs the remission of double damages under Section 11 of the PPA, 29 U.S.C. § 260, in determining whether TWA had acted "willfully" and, hence, was liable for double damages under Section 7(b) of the ADEA, 29 U.S.C. § 626(b). The Court reasoned that "the same concerns are reflected" in the two liquidated damages provisions. Slip op. at 16 n.22. The Court's analysis confirms the need to review the standard adopted by the court below in holding that Northwest is liable for double damages.

1. The Court in *Thurston* held that TWA had not "willfully" violated the ADEA because the "record makes clear that TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA." Slip op. at 16. In reaching this conclusion, this Court relied on evidence that TWA officials "sought legal advice and consulted with the Union" in reviewing its retirement policies in light of amendments to the ADEA. Slip op. at 17. It then adjusted its policies in a manner that it believed, albeit mistakenly, was lawful.

By contrast, the appellate court in this case reversed the district court, which had relied on several factors, including Northwest's collective bargaining history, in initially finding that Northwest had reasonably and in good faith concluded that it was in compliance with the Equal Pay Act. The court below held that such factors were legally irrelevant, and instead focused exclusively on the existence of "legal unceratinty."

This Court's own reliance in *Thurston* on such factors as consultation with the union conclusively demonstrates that the court of appeals improperly restricted the liquidated damages issue to the existence of "legal uncertainty." Indeed, in *Thurston* this Court nowhere suggested that "legal uncertainty" must have been the basis for the employer's mistaken conclusion, as *Laffey* held; to the contrary, this Court observed that "the parties . . . simply overlooked the challenged aspect" of TWA's policy. Slip op. at 17. The analysis in *Laffey* cannot stand in light of *Thurston*.

2. *Thurston* also compels the conclusion that the trial court in this case correctly decided in 1974 not to award liquidated damages and that additional evidence submitted by Northwest on remand supported that conclusion.

In holding that TWA had acted reasonably and in good faith, this Court relied on the fact that TWA officials "met with their lawyers to determine whether the mandatory retirement policy violated the Act." Slip op. at 16. Those officials, after consultation with the pilots' union, then reached a conclusion as to the Act's requirements. While this Court held that those conclusions were erroneous, the Court found no basis to believe that TWA was acting unreasonably or in bad faith, given its efforts to comply. The Court considered it critical that "[t]here [was] no indication that TWA was ever advised by counsel that its new transfer policy discriminated against captains on the basis of age." Slip op. at 17. Indeed, the Court found that TWA had acted reasonably and in good faith despite the fact that the union *opposed* the policy.

The record in this case presents an even clearer case. The trial court in *Laffey* found that Northwest officials met with Northwest's labor relations counsel to review the pay differential between pursers and stewardesses in light of the Equal Pay Act and Title VII after the enactment of those statutes and "concluded that the jobs of purser and stewardess were *in fact* different." App. 253a (emphasis in original). In its initial decision not to award liquidated damages, the trial court also found that Northwest officials had relied on several factors in reaching their belief that they were not violating the law, such as the long-established practice of the company, which reflected the results of 25 years of collective bargaining with the stewardess-dominated labor union. Indeed, unlike *Thurston,* where there had been union opposition to the challenged practice, in *Laffey* there were no complaints or even suggestions from stewardesses or their union that the pay differential was improper.

Thus, as in *Thurston,* the record below demonstrates that Northwest officials, like TWA officials, recognized the need to consider the impact of the new law on its policies, considered those policies with the aid of counsel and in light of the position of the employees' union, and concluded that its policies were lawful. The trial court initially concluded that Northwest in fact believed that it was in compliance with the Equal Pay Act and that "it was not unreasonable" for it to do so. App. 220a.

The analysis in *Thurston* ineluctably leads to the conclusion that Northwest acted reasonably and in good faith, and that the court of appeals improperly restricted the trial court's consideration of factors

other than "legal uncertainty." Northwest's petition should be granted to bring the law in the D.C. Circuit into line with this Court's decision in *Thurston*.

CONCLUSION

The petition for a writ of certiorari should be granted to consider the two issues discussed above and the other two issues presented by the petition.

Respectfully submitted,

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